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No. 87-2050

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COUNTY OF ALLEGHENY, CITY OF PITTSBURGH, AND CHABAD,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX A. LEVINE AND MALIK TUNADOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT MALIK TUNADOR'S BRIEF IN OPPOSITION

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Question Presented

Whether the establishment clause of the first amendment prohibits the County of Allegheny and the City of Pittsburgh from erecting religious displays, including a Nativity scene and a Chanukah Menorah, on the premises of the County Courthouse and the City-County Building.

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Statement of the Case

Each year, the County of Allegheny and the City of Pittsburgh place sectarian religious displays on the premises of the buildings which house their government offices. The Courthouse Nativity scene contains figurines representing the Virgin Mary and Joseph kneeling in front of a baby Jesus attended by three kneeling shepherds whose hands are clasped in prayer. The shepherds represent the three wise men who travelled to witness the birth of Jesus as recounted in Matthew 2:11-12. An angel rests on the roof of the barn, holding a banner bearing the Latin inscription "Glory In Excelsis Deo," or "Glory to God in the Highest," taken from Luke 2:1.

A large Chanukah Menorah stands on the steps of Pittsburgh's City-County Building. The Chanukah Menorah is a religious symbol commemorating miracles associated with the Jewish holiday of Chanukah, which marks the redemption of the ancient temple by the Jews. *Lubavitch of Iowa, Inc. v. Walters*, 684 F.Supp 610 (S.D. Iowa 1988), *aff'd*, 806 F.2d 12 (7th Cir. 1988). E. Royston Pike, *Encyclopaedia of Religion and Religions* 171 (1958).

Anyone passing or entering the Allegheny County Courthouse or Pittsburgh's City-County Building cannot avoid seeing these religious displays. In addition to various courts, the Allegheny Courthouse contains the Sheriff's office, the offices of the County Treasurer, County Controller, County Commissioner, and the County Clerk. The Pittsburgh City-County Building houses the Mayor's office, the City Council, the City Treasurer, some civil courts and other minor governmental offices.

The American Civil Liberties Union and individuals of various religious faiths initiated this lawsuit in district court to restrain Allegheny County from maintaining the Nativity scene at the County Courthouse and to restrain the City of Pittsburgh from erecting a Menorah at the City-County Building. Following a hearing on December 15, 1986, the district judge denied the requested preliminary injunction. Following a second hearing, the district judge entered an order denying the plaintiffs' motion for a permanent injunction and for declaratory relief. The plaintiffs appealed, and a majority of a panel of the United States Court of Appeals for the Third Circuit

reversed the district judge. The Third Circuit applied the tripartite establishment clause analysis developed by this Court in *Lemon v. Kurtzman*, 403 U.S. 603 (1971) and held that the religious displays violated the second prong of the *Lemon* test by having the effect of government endorsement of religion.

REASONS FOR DENYING THE WRIT

Summary of Argument

The writ should be denied because the Third Circuit decision is fully consonant with the decisions of this Court. The Third Circuit properly applied *Lynch v. Donnelly*, 465 U.S. 602 (1984) and *Lemon v. Kurtzman*, this Court's decisions governing religious displays under the establishment clause. The decision of the court of appeals is also consistent with all of the applicable circuit and district court decisions holding unconstitutional the display of religious symbols at the seat of government. Finally, the specious argument that the display of a Christmas tree at City Hall requires the city to also allow the display of a Chanukah Menorah does not warrant the granting of a writ.

I. THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT COMPLIES WITH THE APPLICABLE DECISIONS OF THIS COURT, INCLUDING *LYNCH V. DONNELLY*.

A. The Third Circuit Decision Complies with *Lynch v. Donnelly*, *Lemon v. Kurtzman* and the Applicable Decisions of Other Federal Courts.

The Third Circuit properly applied the tripartite establishment clause analysis developed in *Lemon v. Kurtzman*.[1] In *Lynch*, while emphasizing the context of the creche, this Court reaffirmed the vital role of the *Lemon* test in determining the constitutionality of religious symbols under the establishment clause. *Lynch* upheld under the establishment clause limited government financial support for a

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[1] To pass constitutional muster under the establishment clause, the challenged government activity must have a secular purpose, its primary effect must neither advance nor inhibit religion, and it must not foster excessive government entanglement with religion. *See* 403 U.S. 603, 612-613 (1971).

creche surrounded by secular symbols which was erected by a private merchants association and which sat on private property. 465 U.S. at 684.

The Third Circuit decision in no way conflicts with or evades *Lynch*. The court of appeals acknowledged the role of *Lynch* in analyzing the constitutionality of government support for religious displays, 842 F.2d at 660, but the court below also recognized the crucial factual distinctions between *Lynch* and the present case. As in *Lynch*, this case involves profoundly religious symbols. *See Lynch*, 465 U.S. at 685; *see also Lubavitch of Iowa*, 684 F. Supp. 610 (Chanukah Menorah constitutes a religious symbol). Chabad's *cert.* petition itself concedes that the Chanukah Menorah represents a Jewish religious symbol. Unlike *Lynch*, however, where the religious symbol sat on private property, the religious symbols in the present case sit on a particular and unique form of government property: the buildings which house and represent local political authority.

The display of religious symbols on the premises of the seats of government of the county and city differs entirely from the Nativity scenes in *Lynch* and in *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court*, 471 U.S. 83 (1985), neither of which stood on the grounds of the offices of the government. Consequently, in applying the *Lemon* test, the Third Circuit properly took guidance from the decisions of other circuits holding unconstitutional the display of religious symbols on the premises of political office buildings.

In *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987), the Seventh Circuit held that the establishment clause prohibits the display of religious symbols on the premises of the Chicago City-County Building, a context which mirrors the present case. The Seventh Circuit analyzed the impermissible message of government endorsement of religion communicated by a privately-owned creche which was prominently displayed in the lobby of the Chicago City-County Building:

> The presence of government in Chicago's City Hall is unavoidable. . . . [E]very display and activity in the building is implicitly marked with the stamp of government approval. The pres-

> ence of a Nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorses Christianity.

827 F.2d at 128.

Similarly, in *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1551 (6th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 421 (1986), another decision involving the display of a Nativity scene at City Hall, the Sixth Circuit concluded:

> It is difficult to believe that the city's practice of displaying an unadorned creche on the City Hall lawn would not convey . . . the message that the City endorses Christianity.

791 F.2d at 1556.

In the present case, the court of appeals recognized the distinctions between *Lynch* and cases in which the challenged religious symbols are displayed on government property. The court correctly applied the *Lemon* test and therefore the writ of *certiorari* should be denied.

B. Religious Symbols on Government Property Unconstitutionally Detract from Nonadherents' Standing in the Political Community.

Nativity scenes and Menorahs on the grounds of courthouses and city halls result in government endorsement of religion. In her concurring opinion in *Lynch*, Justice O'Connor explained the political rationale underlying the establishment clause's prohibition of such endorsement:

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

465 U.S. at 688.

When the government's daily operations are carried out in the shadow of a Menorah or a creche, the nonadherent's stature as a member of the political community is diminished. The Allegheny County Courthouse and the Pittsburgh City-County Building house the machinery of local government. It is in these buildings that one

pays taxes, records interest in real estate, seeks the authority of government to redress wrongs, both civil and criminal, and in which politicians reach decisions which control the affairs of the community. Although the wall which separates church and state is not impenetrable, it must keep religious symbols apart from the buildings which house the core functions of our democratic system.

C. The Third Circuit Adhered to this Court's Longstanding Sensitivity to the Perception of Government Endorsement of Religion Created by the Physical Context of Religious Activities.

In distinguishing the setting of the present Nativity scene and Menorah from the *Lynch* creche, the Third Circuit complied with this Court's longstanding concern for the perceptions created by the physical context of religious activities and government. For example, this Court has long treated religious activities on public property differently from similar government support for religious activities taking place elsewhere. *Compare McCollum v. Board of Education*, 333 U.S. 203 (1948) (holding that the establishment clause prohibits voluntary religious instruction on school premises) *with Zorach v. Clauson*, 343 U.S. 307 (1952) (holding that a similar program conducted off school property passes constitutional muster). *See also Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985); *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963).

These decisions all hold unconstitutional the perception of government endorsement of religion which results from religious activities or symbols occurring within the confines of the nation's public schools, a form of publicly-owned property embodying the power of the state. The Third Circuit, following the decisions of its sister circuits, recognized that for the purposes of analyzing religious displays under the establishment clause, courthouses and city halls also represent a unique form of government-owned property. The writ should be denied because the Third Circuit not only complied with *Lynch* and *Lemon*, but the court below also complied with the many decisions of this Court which recognize the perception of unconstitutional government endorsement of religion resulting when religious activities occur in the context of government authority.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS REGARDING THE UNCONSTITUTIONALITY OF THE DISPLAY OF RELIGIOUS SYMBOLS ON GOVERMENT PROPERTY.

Every circuit court to address the display of religious symbols on the type of government property presented in this case has held that such displays violate the establishment clause of the first amendment; therefore, the writ should be denied. *A.J. Congress v. City of Chicago*, 827 F.2d 120; *A.C.L.U. v. City of Birmingham*, 791 F.2d 1561; *A.C.L.U. v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 458 (1986). Many district courts also have held that the establishment clause forbids the display of religious symbols on government property. *E.g., Lubavitch of Iowa, Inc.*, 684 F.Supp. 610; *A.C.L.U. v. Miss. State GSA*, 652 F.Supp. 380 (D.Miss. 1986); *Burelle v. City of Nashua*, 599 F.Supp. 792 (D.N.H. 1984). Relying on *Lemon*, these cases uniformly hold unconstitutional the display of religious symbols on the premises of property which house the key functions of government. The Third Circuit now joins the many courts which have acknowledged this principle.

McCreary v. Stone is the only circuit court decision to uphold a creche on public property. Since the *Scarsdale* creche was situated in a traditionally public forum, the *McCreary* court, relying upon *Widmar v. Vincent*, 454 U.S. 236 (1981), focused on the right to free expression in a public forum under the first amendment, 739 F.2d at 723. Significantly, the *McCreary* court did not view a privately sponsored creche as communicating a message of government endorsement or approval. To the contrary, the Second Circuit specifically held that such expression in a public forum does not bear the imprimatur of government approval. 739 F.2d at 727.

In sharp contrast to the public park in *McCreary*, the Allegheny County Courthouse and the Pittsburgh City-County building involved in this case do not constitute public forums. Not all publicly owned property constitutes a public forum. *Hazelwood v. Kuhlmeier*, ___ U.S. ___, 108 S.Ct. 562 (1988). The decision below differs from *McCreary*, but the two decisions are not inconsistent.

III. THE ESTABLISHMENT CLAUSE PROHIBITS AID TO ONE OR MORE RELIGIONS.

Petitioner Chabad's novel argument that the display of a Christmas tree requires the City of Pittsburgh to allow the display of a Chanukah Menorah also does not warrant the granting of a writ. That argument, presented in Chabad's petition for *certiorari*, eviscerates the meaning and purpose of the establishment clause. Chabad's petition acknowledges that the display of religious symbols at the seat of local government unconstitutionally endorses religion, contending, "the Menorah's principal effect is to mitigate the one-sided encouragement or appearance of official endorsement conveyed by a large Christmas tree on the steps of the city's public building." Petition for writ of *cert.* of Chabad at 7-8. While the constitutionality of the Christmas tree is not at issue here, even if the tree were a religious symbol like the Nativity scene, the argument that the first amendment better tolerates two violations of the establishment clause than one defies common sense.[2]

Chabad would ground this novel restatement of the first amendment upon putative neutrality principles. The establishment clause, however, prohibits aid to any or all religions. *See Everson v. Board of Education*, 330 U.S. 1 (1984). *See also Wallace v. Jaffree*, 472 U.S. 38 (1985); *McCollum v. Board of Education*, 333 U.S. 203 (1948). In *Everson*, this Court explained:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.

330 U.S. at 15.

The Chabad petition relies upon *dicta* drawn from *Larson v. Valente*, 456 U.S. 228 (1982), stating that "one religious denomination cannot be officially preferred over another." 456 U.S. at 245. To place a Menorah, a creche, a Buddha, or any other religious

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[2] In *Lynch*, this Court indicated that a Christmas tree does not constitute a religious symbol. 465 U.S. at 685. *See also City of St. Charles*, 794 F.2d at 271.

symbol inside a courthouse or a city hall, however, effects precisely that unconstitutional result. Adding another religious display in no way mitigates the appearance of official religious preferences. Moreover, Chabad's argument would have the government identify and represent every religious faith, which inevitably would result in impermissible entanglement as governmental authorities try to distinguish among the various faiths wishing to be represented in the City-County building. *Lemon*, 402 U.S. at 612-613.

The purpose of the establishment clause is to protect the rights of religious minorities. *See Grand Rapids*, 473 U.S. at 382. Yet Chabad's peculiar reasoning reduces America's religious pluralism to only two mainstream faiths, Christianity and Judaism. As America's religious diversity continues to expand, however, the establishment clause mandate against government sponsorship of religion becomes ever more important. *Abington v. Schempp*, 374 U.S. at 222. All religious faiths are undermined by the display of a Jewish or a Christian symbol, or both, on the premises of buildings which house the offices representing the government. *Engel v. Vitale*, 370 U.S. 421, 430-431 (1962).

Conclusion

For the reasons set forth above, Respondent Malik Tunador respectfully urges this Court to deny the petition for a writ of *certiorari*.

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